



Threats to the International Trade Regime: Economic and Legal Challenges Arising from Anti-Offshoring Measures Across the Globe

DETH SAO AND AMAR GUPTA* **

Abstract

The stability and growth of the international trade regime is threatened by the emergence and proliferation of anti-offshoring measures by governments worldwide. The business practice of offshoring transfers domestic production of goods and services abroad as a means of achieving optimal use of a firm's resources and capitalizing on comparative advantage. While companies have relocated manufacturing activities for centuries, the emergence and growth of services offshoring in recent decades has not only contributed significantly to greater global economic growth and prosperity, but also ignited a fluctuating frenzy of protectionist fears and measures at national and sub-national levels against offshoring that continues to the present day. Such a backlash is based on concerns that offshoring results in domestic job losses, wage reduction and inequality, and disruption of business innovation and productivity. This motivates examination of the legitimacy of these perceptions and the legality of governmental actions in the offshoring arena, as such measures undercut and potentially violate the commitments made by nations to the World Trade Organization and various other trade agreements. In the United States, the majority of state governments have proposed anti-offshoring bills, several of which have been enacted. The U.S. Constitution empowers the federal government with exclusive authority over the areas of interstate commerce,

* Deth Sao is a Business Research & Development Associate at Seidenberg School of Computer Science and Information Systems at PACE University. She earned a J.D. in 2010 at James E. Rogers College of Law at the University of Arizona and a B.A. in 2001 at Wellesley College. She is a member of the Massachusetts and New York Bars. Dr. Amar Gupta is Dean and a Phyllis and Ivan Seidenberg Endowed Professor at Seidenberg School of Computer Science and Information Systems at PACE University. He earned a Ph.D. in 1980 from the Indian Institute of Technology in Delhi, a M.S. in 1980 from the Massachusetts Institute of Technology Sloan School of Management, and a Bachelor's of Technology degree in 1974 from the Indian Institute of Technology in Kanpur.

** The authors acknowledge the valuable research assistance provided by Karthikeyan Ramadoss, former Graduate Assistant at the University of Arizona Eller College of Management, who has written on these issues and shared insights in his student paper, *Legality of Anti Outsourcing Legislatives Across the World*. We also thank Daneal Grotenhouse, former University of Arizona Law Library Fellow, for her research efforts towards several aspects of this paper. Additionally, the authors express their gratitude for the support and guidance of the University of Arizona James E. Rogers College of Law and the Thomas R. Brown Foundation, without which this endeavor would not have been possible.

foreign affairs, and foreign trade. All these constitutional principles are arguably violated when state governments enact anti-offshoring legislation. The U.S. experience is not singular, as similar policies are being considered and/or implemented in other nations or nation-groups. In particular, the European Union (EU) and a host of other countries have adopted discriminatory measures relating to personal data protection that place foreign service suppliers at a disadvantage compared to their domestic counterparts. These countries and the EU are strong proponents of free trade and have signed onto a variety of trade agreements. Adherence to these commitments means accepting that free trade is a two-way street and comes with benefits and constraints. Furthermore, countries must look beyond restrictive approaches to embrace a combination of pro-business policies that promote labor market flexibility and investment as well as employment security initiatives around worker retraining and mobility to resolve the short-term distributional effects of globalization. These issues are analyzed with respect to the current situation.

I. Introduction

The vital role that offshoring plays in advancing global economic growth and prosperity necessitates an examination of the legality and popularity of anti-offshoring measures across the globe.¹ Offshoring moves production of goods and services from domestic to foreign locations to increase efficient use of a firm's resources.² Offshoring, a longstanding and profitable cross-border practice, includes outsourcing activities to third parties abroad and insourcing activities to foreign affiliates.³ While relocation of manufacturing processes abroad has been a common operational strategy for many years and was well established by the 1980s,⁴ the rise of globalization in the past two decades has spurred the emergence and growth of services offshoring to the present day.⁵ The globalizing forces propelling offshoring include the convergence of trade liberalization policies, increasing global labor supply, foreign investment, and rapid technological advances in transportation and communications.⁶ The availability of an offshore labor pool with a diverse skill set, for example, enables firms to achieve efficiency gains by hiring them to perform tasks in which they have comparative advantage.⁷ As a result, the global trade structure has

1. See, e.g., Gary Gereffi & Karina Fernandez-Stark, *The Offshore Services Value Chain Developing Countries and the Crisis*, 2 (The World Bank Policy Research, Working Paper No. 5262, 2010), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5262> (noting that services offshoring "has become an important source for employment and economic growth around the globe").

2. Amar Gupta, David A. Gantz, Devin Sreecharana & Jeremy Kreyling, *Evolving Relationship Between Law, Offshoring of Professional Services, Intellectual Property, and International Organizations*, 21 INFO. RESOURCES MGMT. J. 103, 103 (2008).

3. DESIRÉE VAN WELSUM & XAVIER REIF, POTENTIAL OFFSHORING: EVIDENCE FROM SELECTED OECD COUNTRIES 3 (2005), available at http://emlab.berkeley.edu/users/webfac/cbrown/e153_sp06/2005btfwelsun.pdf.

4. *The Story so Far, Offshoring has Brought Huge Economic Benefits, but at a Heavy Political Price*, ECONOMIST, Jan. 19, 2013, at 5, available at <http://www.economist.com/news/special-report/21569574-offshoring-has-brought-huge-economic-benefits-heavy-political-price-story-so> [hereinafter *The Story so Far*].

5. William Milberg & Deborah Winkler, *Actual and Perceived Effects of Offshoring on Economic Insecurity: The Role of Labour Market Regimes*, in MAKING GLOBALIZATION SOCIALLY SUSTAINABLE 163 (Marc Bacchetta & Marion Jansen eds., 2011).

6. *Id.*

7. Gianmarco I. P. Ottaviano, Giovanni Peri & Greg C. Wright, *Immigration, Offshoring and American Jobs* 2 (Ctr. for Econ. Performance, Discussion Paper No. 1147, 2012), available at <http://cep.lse.ac.uk/pubs/download/dp1147.pdf>.

been altered to one of “trade in tasks,” where the production process has broadened to include performance of intermediated tasks by low-skill or high-skill labor.⁸

Services offshoring potentially encompasses any task that may be performed anywhere; these tasks rely heavily on information and communication technologies with the resulting product being delivered via these technologies.⁹ Other distinguishing attributes of offshorable tasks include use of codifiable knowledge content and no requirement of face-to-face contact.¹⁰ Intermediate processes such as office and administrative support, business and financial operations, and computer and mathematical services share these characteristics and have already been offshored.¹¹ Firms from industrialized countries have also begun to offshore “core competencies,” related to marketing, finance, research, development, and design.¹² Furthermore, a 2005 study of selected Organisation for Economic Co-operation (OECD) countries estimated that nearly 20 percent of total employment in low and high skill white-collar occupations is potentially affected by offshoring.¹³ In particular, business services including accounting, consulting, financial services, and research and development experience a relatively high share of such impact.¹⁴ A later study, by Blinder and Krueger (2009), focusing on the United States, found that in the aggregate, 25 percent of U.S. jobs were offshorable, whereas at a specific job level, 70 percent to 80 percent of tasks were offshorable.¹⁵ The expansion of offshoring into new industries and business processes has generated great concern among policymakers and the public across the globe.¹⁶ Services offshoring, in particular, incites pronounced anxiety in industrialized countries, as much of the public views the migration of jobs in these sectors as the remaining bastions of economic security.¹⁷ One Eurobarometer of selected EU nations spanning from 2004 to 2008 revealed that all participants, except Denmark and Sweden, associated offshoring with job displacement and instability.¹⁸ In the United States, a 2007 survey showed that 75 percent of the nation believed “outsourcing work overseas hurts American workers.”¹⁹ Such a strong response is attributed to a 2003 Forrester study estimating the loss of 3.3 million U.S. jobs over a fifteen-year period as a result of services offshoring.²⁰ The potential of job losses in this sector elicited greater outrage than the decline of low-skilled manufacturing jobs, as white-collar work repre-

8. Milberg & Winkler, *supra* note 5, at 159.

9. VAN WELSUM & REIF, *supra* note 3, at 6.

10. *Id.*

11. Roger J. Moncarz, Michael G. Wolf & Benjamin Wright, *Service-Providing Occupations, Offshoring, and the Labor Market*, MONTHLY LAB. REV., Dec. 2008, at 72, available at <http://www.bls.gov/opub/mlr/2008/12/art4full.pdf>.

12. Milberg & Winkler, *supra* note 5, at 166.

13. VAN WELSUM & REIF, *supra* note 3, at 6.

14. *Id.*

15. Alan S. Blinder, *On the Measurability of Offshoring*, VOX (Oct. 9, 2009), <http://www.voxeu.org/article/twenty-five-percent-us-jobs-are-offshorable>.

16. *Id.*

17. Gene M. Grossman & Esteban Rossi-Hansberg, *Trading Tasks: A Simple Theory of Offshoring* 7 (Nat'l Bureau of Econ. Research, Working Paper No. 12721, 2006), available at <http://www.nber.org/papers/w12721>; Milberg & Winkler, *supra* note 5, at 180–181.

18. Milberg & Winkler, *supra* note 5, at 181.

19. *Id.*

20. *Id.* at 180.

sented a primary area of future job prospects and growth.²¹ Additionally, the 2007 – 2008 financial crisis deepened anti-offshoring sentiments in many countries as a result of high levels of unemployment.²²

To quell these fears, one immediate and popular response has been and continues to be the promotion and/or implementation of anti-offshoring bills, laws, and policies by various governments and regional governing bodies.²³ These measures generally fall in two categories, (1) restrictions against overseas procurement of goods and services by government agencies at national and/or subnational levels and (2) restrictions or financial penalties imposed against firms for moving production processes overseas.²⁴ For instance, several U.S. states have proposed or enacted bans against performance of public contract work overseas or limit performance of public contract work to those legally authorized to work in the United States.²⁵ As this paper will demonstrate, these measures not only potentially violate the legally binding commitments made by countries that are parties to international and multilateral trade agreements, but they actually impede economic security and growth on domestic and global levels. These measures implicate multijurisdictional matters and entities and likely need to meet additional conditions beyond domestic enactment in order to be legally valid. Laws of national and sub-national governments must be consistent with the constitutions of their respective countries as well as with commitments under World Trade Organization (WTO) agreements and other pertinent treaties and agreements.

While there is no world government to formulate and enact international laws, cross-border treaties and agreements constitute one primary mechanism for attaining a rule of law at the global level.²⁶ By way of examples, laws passed by U.S. state and local governments must comport with applicable international, multi-lateral, or bi-lateral treaties and agreements, where such agreements are applicable.²⁷ In Europe, the European Union (EU) acts as a supranational body whose regulations and directives can be binding upon concerned national governments.²⁸ But EU directives may, in turn, need to comply with

21. *Id.*

22. *The Story so Far*, *supra* note 4, at 2.

23. E.g., *Offshore Outsourcing: Impact on the American Workplace*, BRAUN CONSULTING NEWS (Braun Consulting Grp., Seattle, WA), Summer 2004, at 45 available at <http://www.braunconsulting.com/bcg/newsletters/summer2004/summer2004.html> (last visited Jan. 2, 2014); Sunni Yuen, *Exporting Trust with Data: Audited Self-Regulation as a Solution to Cross-Border Data Transfer Protection Concerns in the Offshore Outsourcing Industry* 9 COLUM. SCI. & TECH. L. REV. 41 (2008).

24. E.g., SHANNON KLINGER & M. LYNN SYKES, *EXPORTING THE LAW: A LEGAL ANALYSIS OF STATE AND FEDERAL OUTSOURCING LEGISLATION* 4–16 (2004), available at http://www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf.

25. *Id.*

26. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 358 (2002).

27. See, e.g., *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (“The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and . . . any conflicting law of the State must yield.”); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924) (“The treaty-making power of the United States is not limited by any express provision of the Constitution, and . . . [it] does extend to all proper subjects of negotiation between our government and other nations.”); *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (rejecting the state’s property interest in migratory fowl in favor of supporting the significance of the national interest involved, the need for international cooperation, and the infeasibility of relying on state self-regulation).

28. Ernest A. Young, *Protecting Member State Autonomy In The European Union: Some Cautionary Tales From American Federalism*, 77 N.Y.U. L. REV. 1612, 1622 – 29 (2002).

the mandates of global supranational bodies, such as the WTO.²⁹ This hierarchy of legal structures provides a mechanism to study the legality of laws, bills, and policies that inhibit or discourage offshoring.

In order to better understand the current situation, Part II of this paper discusses the global nature and impact of services offshoring, with particular focus on actual and perceived benefits and costs, in order to examine the legitimacy and effectiveness of anti-offshoring measures. Part III builds upon empirical observations of offshoring to legal analysis of anti-offshoring measures, starting with the legal framework of international trade and the applicability and scope of commitments made by countries to national and multilateral trade agreements. Part IV extends the legal analysis to examine anti-offshoring measures across the globe, focusing on the United States as a case study for violations against its own constitution and international obligations. To assess the legal legitimacy of these actions, the section will also examine personal data restriction legislation by nations and nation-groups, such as the EU, to determine whether public policy concerns serve as a valid defense. Finally, Part V concludes that the lack of empirical evidence and legal basis on domestic and international levels to justify anti-offshoring measures requires exploration of alternative approaches. For instance, nations such as Denmark have shown that costs of offshoring may be successfully overcome through a combination of pro-business policies that promote labor market flexibility and investment as well as employment security initiatives around worker retraining and mobility.

II. The Global Impact of Offshoring: Actual and Perceived Benefits and Costs

An evaluation of the legitimacy of anti-offshoring measures first requires a determination of true benefits and costs that are supported in empirical evidence, as several widely accepted perceptions and theories that motivate support for these measures are either misplaced or exaggerated.³⁰ To determine the difference between actual and speculative effects of offshoring, this section will evaluate the veracity of the following assertions invoked to justify anti-offshoring measures: (1) relocation of production processes results in job displacement and lower wages for domestic workers; (2) trade in tasks flows one-way from industrialized to developing countries, enabling the latter to primarily benefit from this exchange; (3) geographical distribution of workers is a barrier to innovation and competitive strength; and (4) face-to-face interaction is required to achieve optimal productivity.³¹ Before delving into the empirical evidence presented throughout this section, it is important to note that no official data exists that directly measures offshoring.³² The following indirect measures are used as proxies: data on trade in services, employment data, input-output tables, and trade in intermediates.³³

29. See Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 COLUM. J. EUR. L. 125, 167 (2005–2006).

30. See generally Milberg & Winkler, *supra* note 5.

31. See generally Amar Gupta et al., *Use of Collaborative Technologies and Knowledge Sharing in Co-Located and Distributed Teams: Towards the 24-h Knowledge Factory*, 18 J. OF STRATEGIC INFO. SYS. 147 (2009) [hereinafter *Collaborative Technologies*].

32. VAN WELSUM & REIF, *supra* note 3, at 6.

33. *Id.*

A. THE NEUTRAL (AND POTENTIALLY POSITIVE) IMPACT OF OFFSHORING ON THE LABOR MARKET

It is widely assumed that offshoring is a zero-sum game that results in winners and losers.³⁴ One justification for this perception is that when firms cut costs and increase profits through foreign relocation, domestic workers suffer from job displacement and lower wages.³⁵ Econometric studies on the impact of offshoring on the labor market reveal several nuanced outcomes of offshoring's distributional effects that undermine and bring greater complexity to such a blanket statement.³⁶ In particular, the "winners" are not necessarily confined to companies, as other parties benefit either directly or indirectly through offshoring's diffusive effect on the economy.³⁷ Furthermore, any party subjected to losses in this exchange may suffer in the short-term, but in the long-term, offshoring creates better economic opportunities for all participants.³⁸

First, empirical evidence supports a finding of significant cost reduction for firms engaging in offshoring. As alluded to earlier, globalization has enabled greater efficient resource allocation. The availability of foreign labor pools allows firms to capitalize on comparative advantage by enabling them greater flexibility in matching individuals with tasks best suited to their skill set.³⁹ Transformative technological advances in transportation and communication have facilitated separation of tasks that allow firms to simultaneously profit from factor cost differences between countries and gains from specialization.⁴⁰ For example, developments in communications technology have reduced transaction costs via instantaneous and electronic delivery of instructions and tasks.⁴¹ In a study on services offshoring and innovation by firms in Ireland from 2000 to 2004, Görg & Hanley found that offshoring had a positive effect on profitability as a consequence of capitalizing on cheaper intermediate factors abroad.⁴² In particular, a 1 percent increase in offshoring intensity increased the profit ratio by approximately 0.4 percent.⁴³

Second, the body of empirical evidence on the relationship between offshoring and the domestic labor market points to the complicated nature of offshoring's impact on jobs and wages. Recent studies affirm an association between offshoring and job and wage losses among domestic workers, but the extent of such losses point to the negligible impact of such costs in the aggregate.⁴⁴ With regard to employment, an Amiti and Wie study found that services offshoring between 1992 and 2000 reduced manufacturing employment in

34. Milberg & Winkler, *supra* note 5, at 157.

35. WINSTON W. CHANG, *THE ECONOMICS OF OFFSHORING 1* (2012), http://faculty.washington.edu/karyiu/confer/sea12/papers/Chang_w.pdf.

36. See Milberg & Winkler, *supra* note 5, at 160.

37. CHANG, *supra* note 35, at 1.

38. *Id.*

39. Ottaviano, Peri & Wright, *supra* note 7.

40. Grossman & Rossi-Hansberg, *supra* note 17, at 2.

41. *Id.*

42. See generally Holger Görg & Aoife Hanley, *Services Outsourcing And Innovation: An Empirical Investigation* (Kiel Institute for the World Economy, Working Paper No. 1417, 2008), available at http://www.ifw-members.ifw-kiel.de/publications/services-outsourcing-and-innovation-an-empirical-investigation-1/kap_1417_Goerg_Hanley.pdf.

43. *Id.* at 17.

44. Ottaviano, Peri & Wright, *supra* note 7, at 24; Milberg & Winkler, *supra* note 5, at 164; CHANG, *supra* note 35, at 11.

the United States by 0.4 percent annually in many sectors, but across all industries on a national scale, this negative effect disappears.⁴⁵ Such an outcome is attributed to greater efficiency in some sectors as a byproduct of services offshoring, which has led to job creation in other sectors.⁴⁶ These findings are affirmed by Ottaviano et. al's survey on fifty-eight U.S. manufacturing industries from 2005 to 2007.⁴⁷ There, offshoring had no effect on domestic employment in the aggregate.⁴⁸ While it was clear that offshoring caused job displacement in an industry, the productivity gains arising from employment abroad led to commensurate increases in overall U.S. employment, thereby having a neutral impact on domestic employment.⁴⁹ In particular, offshoring propels domestic workers into more complex work while their foreign counterparts focus on less-skilled tasks.⁵⁰

Just as significantly, van Welsum and Reif's study of selected OECD countries spanning 1996 to 2003 revealed similar results with respect to services offshoring.⁵¹ The analysis showed that no systematic evidence supported an association between services offshoring and employment decline at the aggregate level.⁵² Similar to Ottaviano et. al's finding of productivity gains, the only measurable impact indicated was a positive statistical association with increasing demand for jobs involving information and communications technologies.⁵³ Not only have existing services sectors expanded, but new services have been and continue to be created in step with ongoing technological developments and services trade liberalization.⁵⁴ Finally, not only does offshoring's impact on employment vary at individual industry and aggregate levels but also upon worker skill level. With some exceptions, studies have found that offshoring is associated with higher employment and wages for high-skilled workers and a decline in employment for low-skilled workers.⁵⁵

With respect to offshoring's impact on wages and the related issue of wage inequality, the body of empirical research is less clear and requires further investigation.⁵⁶ One long-standing assumption, which arises from conventional trade theory, posits that wage inequality widens in industrialized countries as a consequence of increased trade with developing countries.⁵⁷ The recent emergence of an opposing theory, postulated by Grossman and Esteban Rossi-Hansberg, opines that costs savings from trading tasks results in a "productivity effect" that leads to increased wages for low-skilled domestic workers.⁵⁸ Such a conclusion arises from Grossman and Rossi-Hansberg's study on U.S. offshoring of low-skilled intensive tasks during 1997 to 2004, which points to the emer-

45. Milberg & Winkler, *supra* note 5, at 160.

46. *Id.*

47. Ottaviano, Peri & Wright, *supra* note 7, at 24.

48. *Id.*

49. *Id.*

50. *Id.* at 26.

51. See VAN WELSUM & REIF, *supra* note 3, at 2.

52. *Id.*

53. *Id.*

54. *Id.* at 7.

55. Milberg & Winkler, *supra* note 5, at 159. Exceptions include a 2007 firm-level study of Germany and a 2008 study of Germany and the UK that associates offshoring with lower wages for high-skilled workers.

56. Koushik Ghosh, Peter J. Saunders & Thomas Teneralli, *Wage Inequality & Offshoring: Are They Related?*, 11 INDIAN J. OF ECON. & BUS. 503, 507 (2012).

57. *Id.*

58. Grossman & Rossi-Hansberg, *supra* note 17, at 16.

gence of this effect when falling costs of offshoring spurs increased trade in tasks.⁵⁹ This translates into greater productivity among low-skilled workers that generates rises in their real wage and shared gains for all domestic factors.⁶⁰

These observations were later tested in 2012 by Ghosh et al. in a follow-up study on offshoring's impact on labor productivity and wage inequality.⁶¹ There, using quarterly data from 1990 to 2011 and computing wage differences between low-skill and high-skill workers in the United States, the study found that offshoring worsens income inequality by negatively impacting low-skilled workers.⁶² At the individual firm level, such a finding is supported by a study led by Hummels et al. on offshoring's impact on wages by skill type in Denmark.⁶³ There, the study matched a population of Danish workers to Danish private sector manufacturing firms spanning 1995 to 2006 and found that offshoring tends to increase high-skill wages and reduce low-skill wages.⁶⁴ In particular, the findings imply that when a firm doubles its offshoring, the average low-skill worker of that firm will suffer a net loss ranging from 4.04 percent to 11.55 percent in the present discounted value (PDV) of income in the next five years.⁶⁵ In contrast, the change to an average high-skill worker's income in that firm will vary from a net loss of 1.44 percent to positive increases of 4.92 percent within the same time period.⁶⁶ These findings, however, must be placed into further context, as the study went beyond analysis at the individual firm level to conduct a comparison between Danish-based offshoring and non-offshoring manufacturing firms.⁶⁷ On a macro level, empirical evidence revealed that offshoring firms paid their workers a higher average wage than their non-offshoring counterparts.⁶⁸ Furthermore, the former also outperformed the latter by generating higher sales, more employment, and larger capital/worker ratios.⁶⁹

Notwithstanding these mixed results with respect to wages, the body of research indicates that offshoring not only benefits firms and workers but also society as a whole by increasing average living standards worldwide.⁷⁰ In developing countries, offshoring has contributed to higher standards of living by raising incomes and spurring economic growth.⁷¹ In the United States, aggregate productivity gains in the manufacturing and services sectors as a result of offshoring leads to rising standards of living.⁷² For example, comparisons between U.S. offshoring and non-offshoring manufacturing firms across industries revealed that relative to the latter, offshoring firms enjoyed greater productivity, utilized more skills, paid much higher wages, and had greater longevity and growth

59. *Id.*

60. *Id.*

61. Ghosh, Saunders & Teneralli, *supra* note 56.

62. *Id.* at 507 – 508.

63. See generally David Hummels et al., *The Wage Effects of Offshoring: Evidence from Danish Matched Worker-Firm Data* (Nat'l Bureau of Econ. Research, Working Paper No. 17496, 2013) available at http://www.kranert.purdue.edu/faculty/hummelsd/research/Offshoring_AER_R3.pdf.

64. *Id.* at 1, 24.

65. *Id.* at 37.

66. *Id.*

67. *Id.* at 21.

68. *Id.*

69. *Id.*

70. CHANG, *supra* note 35, at 1.

71. *Id.* at 14.

72. See *id.* at 12.

rates.⁷³ Also, Hummels et al.'s comparison of Danish offshoring and non-offshoring firms, described above, affirms these results for manufacturing industries across the board.⁷⁴ Similar findings emerged in the U.S. services sectors in the aggregate, with U.S. offshoring firms surpassing their non-offshoring counterparts through higher sales and employment volumes, better worker compensation, and larger sales per worker.⁷⁵ In a comparison study within the same industry, services offshoring firms were in the forefront; they created 70 percent more jobs, reached higher sales by 100 percent, and offered 20 percent more in average compensation.⁷⁶ Offshoring is associated with these increases in industry productivity because it roots out inefficient firms and promotes the growth of efficient firms able to capture larger export shares.⁷⁷

B. OFFSHORING IS A MULTI-DIRECTIONAL FLOW THAT CRISSCROSSES INDUSTRIALIZED AND DEVELOPING COUNTRIES

In addition to expanding the definition of the "winners" from offshoring, research in this area also undermines the related misperception that developing countries mostly benefit from offshoring because production processes are primarily exported from industrialized countries to developing countries. On the contrary, offshoring is a two-way street, as many countries experience both rapid export and import growth of services.⁷⁸ Using trade in services as proxy for services offshoring, van Welsum and Reif conducted a study of selected countries, tracking the average annual growth rate of imports and exports of business, computer, and information services spanning from 1995 to 2003.⁷⁹ The study found that the following fifteen countries were among the top twenty countries with the fastest growth of services exports and imports: United States, United Kingdom, Germany, France, Netherlands, India, Japan, Italy, Ireland, Austria, Spain, Singapore, Canada, China, and Sweden.⁸⁰ In particular, and contrary to American fears that offshoring is reducing economic opportunities in the services sector, the United States is a net exporter of services (meaning that the United States is the recipient of more offshoring activities than it sends abroad).⁸¹ U.S. firms enjoy the majority share of foreign business outsourcing, which includes banking and accounting services and the securities market.⁸² Furthermore, most Asian-based banks and financial entities offshore back office and custodian services to U.S. firms.⁸³

Additionally, the increasing use of offshoring among Asian nations lends further support to the global nature and multi-directional flow of trade in services.⁸⁴ A 2006 KPMG International survey of Asian-based firms, including Australia and New Zealand, revealed

73. *Id.* at 11.

74. Hummels et al., *supra* note 63, at 21.

75. CHANG, *supra* note 35, at 12.

76. *Id.*

77. *Id.*

78. VAN WELSUM & REIF, *supra* note 3, at 4.

79. *Id.* at 3.

80. *Id.* at 4.

81. CHANG, *supra* note 35, at 11.

82. *Id.*

83. *Id.*

84. *Id.* at 10.

that in the aggregate, most respondents offshored to India, China, Singapore, Hong Kong, Malaysia, and the Philippines respectively.⁸⁵ These tradable tasks included IT services, accounting, debt collection, tax processing, data collection, report writing, human resource operations, and supply chain management.⁸⁶ Finally, the falsity of a north-south flow in offshoring is further affirmed by the emergence of reshoring manufacturing and services in recent years (albeit still nascent and small in relation to offshoring).⁸⁷ Reshoring occurs when the cost benefit for relocating to a low-cost country is commensurate to a high-cost country.⁸⁸ The scale, skill, and productivity of workers in low-cost countries have increasingly begun to reach similar levels to their high-cost counterparts.⁸⁹ For instance, the rise in wages in middle and low-income countries in the past decade has begun to erode labor cost advantages of offshoring.⁹⁰ Other cost benefit factors, such as rising transportation costs and technological advances, have prompted the shift towards reshoring.⁹¹ With regard to manufacturing, a 2012 Hackett Group report predicted that offshoring from industrialized to developing countries will decline over the next two years, while reshoring activities will double over the previous two years.⁹² In the area of services, a 2008 Wall Street Journal article observed that narrowing wage gaps between countries and the decline in the U.S. dollar precipitated a shutdown of Indian back office IT operations by U.S. companies.⁹³ Furthermore, concurrent to the emergence of reshoring is the rising shift from low-cost to lower-cost countries, as the latter are now replacing the former in cost effectiveness.⁹⁴ As such, emerging variations in the multi-directional flow of offshoring further demonstrate that offshoring's actual and measurable impact is greater efficient resource allocation across industries and countries, thereby expanding and shifting the definition of what it means to benefit and incur costs from offshoring.

85. *Id.*

86. *Id.*

87. See *Coming Home: A Growing Number of American Companies are Moving their Manufacturing Back to the United States*, ECONOMIST, Jan. 19, 2013, at 6, available at <http://www.economist.com/news/special-report/21569570-growing-number-american-companies-are-moving-their-manufacturing-back-united> [hereinafter *Coming Home*]; CHANG, *supra* note 35, at 14.

88. See *Coming Home*, *supra* note 87.

89. See generally MICHEL JANSSEN, ERIK DORR & MARTIJN GEERLING, THE HACKETT GROUP, JOB LOSSES FROM OFFSHORING AND PRODUCTIVITY IMPROVEMENTS FAR OUTPACE GAINS FROM ECONOMIC GROWTH (2012), available at <http://www.thehackettgroup.com/research/2012/offshoring-update/hcct2012-offshoring-forecast.pdf>.

90. *Coming Home*, *supra* note 87, at 5.

91. See *id.*; CHANG, *supra* note 35, at 14.

92. *Coming Home*, *supra* note 87, at 3; JANSSEN, DORR & GEERLING, *supra* note 89, at 1.

93. Jackie Range, *Rethinking the India Back Office*, WALL ST. J. (Feb. 11, 2008, 12:01 AM), <http://online.wsj.com/article/SB120268744437257531.html>.

94. See Press Release, The Hackett Group, Reshoring of Some Chinese Manufacturing Jobs Becoming Likely as Cost Gap is Expected to Shrink to Just 16 Percent Next Year (May 24, 2012), available at <http://www.thehackettgroup.com/about/research-alerts-press-releases/2012/05242012-reshoring-some-chinese-manufacturing-jobs.jsp>.

C. OFFSHORING AND INNOVATION: THE (ILLUSORY) BARRIER OF GEOGRAPHICAL DISTRIBUTION

Overall, the above analysis indicates that the use of foreign inputs may lower costs, allowing firms to expand output and employment and raise wages at the aggregate level.⁹⁵ In particular, the positive association between offshoring and productivity discussed earlier warrants greater attention here, as innovation is one integral component of a firm's ability to profit and grow.⁹⁶ Detractors often argue that offshoring disrupts innovation due to geographical distribution of workers, as physical proximity is required to foster the high levels of communication and tactical knowledge from which innovation arises.⁹⁷ The analysis below will demonstrate that, contrary to this belief, offshoring is likely not a deterrent but both an enabler and byproduct of innovation. While the body of literature on the association between offshoring and innovation is only beginning to develop, emerging research in this area points to offshoring's positive effect on innovative activity.⁹⁸ In 2008, Görg and Hanley released a forefront study that specifically addressed whether a firm's services offshoring increased its rate of innovation.⁹⁹ The study's use of firm-level data from the Republic of Ireland from 2000 to 2004 is also noteworthy here, as offshoring plays an even more significant role in Ireland's economy than in larger counterparts such as the United States.¹⁰⁰ Indeed, in comparison to the largest economies, Ireland represents one of many smaller countries where offshoring comprises a major share of its international trade.¹⁰¹ Focusing on trade in services and using research and development (R&D) expenditure as a proxy for innovation at the firm level, the analysis revealed that offshoring offered greater opportunities for capitalizing on international factor cost differences, which resulted in increased profits and flexibility in altering production processes towards innovation.¹⁰² Furthermore, the evidence indicated that the higher the rate of a firm's innovation, the greater its ability to advance technologically and remain competitive.¹⁰³ This conclusion, in particular, addresses fears that offshoring's expansion from manufacturing to services will result in "hollowing out" production in industrialized countries.¹⁰⁴ On the contrary, the analysis predicted that technological advances arising from offshoring-enabled innovation ensure that a technological gap between developed and developing countries remains.¹⁰⁵

95. Hummels et al., *supra* note 63, at 21.

96. See generally Toni C. Langlinais & Marco A. Merino, *Future Value and Innovation: How to Sustain Profitable Growth* OUTLOOK (Sept. 2007), http://www.accenture.com/SiteCollectionDocuments/PDF/OutlookPDF_FutureGrowth_03.pdf.

97. *Collaborative Technologies*, *supra* note 31, at 147 – 148.

98. See Görg & Hanley, *supra* note 42, at 4, 19; see also BERNHARD DACHS & BERND EBERSBERGER, *THE EFFECTS OF PRODUCTION OFFSHORING ON R&D AND INNOVATION IN THE HOME COUNTRY* (2013), available at http://www.fiw.ac.at/fileadmin/Documents/Publikationen/Studien_2013_2014/01_DachsEbersberger_ResearchReport.pdf.

99. Görg & Hanley, *supra* note 42, at 4.

100. *Id.* at 10.

101. See PABLO AGNESE & JOAN ENRIC RICART, *OFFSHORING: FACTS AND NUMBERS AT THE COUNTRY LEVEL* (2009), available at <http://www.ub.edu/jei/papers/AGNESE-RICART.pdf>.

102. Görg & Hanley, *supra* note 42, at 5, 18 – 19.

103. *Id.* at 19.

104. *Id.*

105. *Id.*

More recently, Dachs and Ebersberger, in a study released in 2013, affirmed the positive relationship between offshoring and innovation performance.¹⁰⁶ There, data was derived from a 2009 European Manufacturing Survey, a recurring survey that covers three years of product, process, service, and organizational innovation of more than 3,000 manufacturing companies in seven European countries.¹⁰⁷ Seeking specifically to explore offshoring's effect on a firm's R&D and product and process innovation in its home country, the study found offshoring (1) pushes firms to invest in R&D, design, and process innovation; (2) correlates with much higher levels of innovation input, such as R&D and design; (3) increases the likelihood of product innovation at all degrees of the novelty spectrum; and (4) positively affects process innovation by enabling greater investment in advanced production technologies.¹⁰⁸ These findings not only undermine protectionist fears that offshoring is symptomatic of a firm's inability to compete, but also point to its demonstrated effectiveness in strengthening domestic technological capabilities and facilitating a firm's international expansion.¹⁰⁹

D. OFFSHORING & OPTIMAL PRODUCTIVITY: THE (LIMITED) UTILITY OF FACE-TO-FACE INTERACTION

Questionable assumptions related to offshoring and innovation also extend to offshoring's impact on productivity. Just as with innovation, physical proximity is considered vital to the transfer of tacit knowledge between workers.¹¹⁰ In management practice, it has been long perceived that physical separation of workers weakens the inter-personal and inter-organizational collaboration needed for knowledge-intensive tasks; throughout the 1980s and 1990s, this rationale served as the basis for the wide-spread practice of placing cross-functional teams in one location (co-located teams).¹¹¹ Recent research in this area has reached the opposite conclusion, as advances in information technology have now equipped geographically distributed teams (GDTs) with communications capabilities that allow them to achieve equally effective, if not superior, results.¹¹²

For example, Gupta et al.'s 2009 comparison study of co-located teams and GDTs at IBM over a one-year period revealed that geography has no effect on team outcomes.¹¹³ There, the two teams had the same number of individuals and technologies; they also engaged in similar tasks and faced similar deadlines.¹¹⁴ These technologies included email, instant messaging, and the same processes for managing tasks and source code.¹¹⁵ Using a dataset of interviews, observations of weekly meetings, and archival data, the study found that both models experienced similar levels of collaboration.¹¹⁶ In particular, the GDT uniquely benefited from their dispersed working arrangement in the following

106. See generally, DACHS & EBERSBERGER, *supra* note 98.

107. *Id.* at 8.

108. *Id.* at 31.

109. *Id.* at 32.

110. *Collaborative Technologies*, *supra* note 31, at 148.

111. *Id.*

112. *Id.* at 158.

113. *Id.*

114. *Id.* at 153.

115. *Id.*

116. *Id.* at 157.

ways: (1) higher levels of documentation and history retention; (2) clear and concise communication and distribution of work assignments and items; (3) twenty-four-hour worker availability, thereby enabling resolution of time-sensitive, short-term tasks irrespective of a location's work schedule; and (4) continuous engagement with tasks across time zones.¹¹⁷

These GDT-specific work processes merit greater attention, as they point to offshoring's potential to significantly increase efficiency and productivity beyond current levels. One proposed business practice model, put forth by one of the authors of this paper, is a variant of a GDT structure known as the "24-Hour Knowledge Factory."¹¹⁸ Under this model, knowledge-based tasks are continuously performed for 24-hours by passing these tasks from one worker to the next in different time zones.¹¹⁹ The ongoing cycle involves a worker putting in the appropriate hours for her time zone and transferring the task to another worker whose workday is beginning in that time zone.¹²⁰ Presently, the information systems (IS) sector is applying this model for IS design, development, and implementation.¹²¹ Participating software developers completed projects in a much shorter time than their co-located counterparts.¹²² In particular, continuous focus on a given task increased productivity because (1) mandatory testing and approvals took place overnight, allowing software developers to continue work without delay; and (2) geographic distribution of work sites enabled hiring of talented designers who otherwise would be unavailable due to their residency abroad or unwillingness to work nontraditional work hours.¹²³ These promising results in the IS sector may be replicated in a broad range of functions and industries engaged in knowledge-intensive tasks, including medical services, logistics planning, financial analysis, and product design.¹²⁴

Overall, the body of research points to offshoring's current and potential capabilities to increase productivity and efficiency at individual firm and aggregate levels, with direct and diffusive positive distributional effects on the labor market and society as a whole. While costs are incurred at industry levels, particularly among low-skilled workers, empirical evidence undermines the rationale behind the majority of protectionist fears. Furthermore, the positive associations between offshoring and socio-economic indicators discussed earlier demonstrate that anti-offshoring measures are an inappropriate mechanism if one also seeks to increase economic growth and opportunities as part of the solution to resolve offshoring's negative distributional effects.

117. *Id.*

118. *Id.* at 148.

119. *Id.*

120. *Id.*

121. Amar Gupta, *Expanding the 24-Hour Workplace: Round-the-Clock Operations Aren't Just for Call Centers Anymore*, WALL ST. J., Sept. 15, 2007, at R.9, available at <http://online.wsj.com/article/SB118841765731012529.html>.

122. *Id.*

123. *Id.*

124. *Collaborative Technologies*, *supra* note 31, at 159.

III. Anti-Offshoring Measures and the International Trade Regime: Permissible and Impermissible Violations to the Letter and Spirit of Trade Laws

The validity of anti-offshoring measures not only suffers from lack of empirical support but also a strong legal basis justifying these actions. Enactment of anti-offshoring measures exposes governments to potential areas of legal non-compliance at national and international levels as a result of their binding commitments to trade agreements. As a first step to determining the legal legitimacy of these measures, it is instructive to discuss the legal framework for the international trade regime. A review of the scope and nature of the WTO agreements below, which have been signed by the majority of trading nations and ratified by their legislatures, will serve as illustrative examples of the parameters and exceptions under which member nations are allowed to operate.¹²⁵ Just as importantly, it should be noted that, although this analysis will underscore the observation that anti-offshoring measures likely violate the spirit of these trade agreements, a case-by-case examination is required to determine whether a particular country is legally authorized to pursue any measure that is inconsistent with these agreements' provisions.

The WTO describes itself as "an organization for trade opening," at the crux of which are trade agreements with an "overriding purpose . . . to help trade flow as freely as possible—so long as there are no undesirable side effects—because this is important for economic development and well-being."¹²⁶ Several WTO agreements establish the ground rules for trade between nations, with the objective of reducing trade barriers and increasing market access.¹²⁷ As this paper pertains to offshoring, we will only focus on the following relevant agreements: (1) the General Agreement on Trade and Tariffs (GATT), which applies to goods, and (2) the General Agreement on Trade in Services (GATS).¹²⁸

In keeping with the WTO's spirit of advancing trade liberalization, these agreements are designed to foster the core principle of nondiscrimination among WTO members and between foreign and domestic suppliers of goods and services.¹²⁹ This tenet is expressed under the following articles: (1) most favored nation (MFN) treatment (GATS, Article II; GATT, Article I); and (2) national treatment (GATS Article XVII; GATT Article III).¹³⁰

MFN treatment means that all trading partners must be treated equally, such that any policies or changes to trade terms or market access applies to goods and services from all trading partners.¹³¹ Correspondingly, national treatment demands equal treatment of for-

125. *What is the WTO?*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Jan. 7, 2014).

126. *Understanding the WTO: Who We Are*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Jan. 7, 2014).

127. *Understanding the WTO: The Agreements*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (last visited Jan. 7, 2014).

128. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Apr. 15, 1994, 1869 U.N.T.S. 183, available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm [hereinafter GATS].

129. *Understanding the WTO: Basics- Principles of the Trading System*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jan. 7, 2014).

130. *Id.*

131. GATS, *supra* note 128, art. II; GATT, *supra* note 128, art. I.

eign and domestic goods and services once these imports enter the market.¹³² The 1994 Uruguay Round establishing the umbrella WTO Agreement, which covers goods (GATT) and services (GATS), requires member adherence to “the conformity of its laws, regulations and administrative procedures with its obligations as provided.”¹³³ This means that these commitments have broad application to laws directly related to trade and any indirect measure that violates these commitments.¹³⁴ These direct and indirect actions pertain to measures at all levels of a member nation’s government structure.¹³⁵

Notwithstanding the necessity of these bedrock principles to fulfill these agreements’ goals, member nations may discriminate under certain exceptions. These exceptions are expressly stipulated in the agreement in question and/or specific to a particular nation’s terms upon becoming a signatory to the agreement. With respect to WTO agreements’ sanctioned exceptions, discriminatory treatment is only permissible under the following conditions:

- Balance of Payments (GATT, Articles XII and XVIII:B; GATS, Article XII): This applies when a member nation has an unsustainable current account that threatens to become a crisis (e.g., the current account is in deficit and the net imports of goods and services cannot be financed with sufficient inflow of foreign capital or a reduction in foreign reserves);¹³⁶
- Developing Nations (GATT, Article XIV; GATS Article V): Developing countries may have additional time to comply with certain commitments, or be exempted from trade remedy proceedings if the volume of their exports of the affected product to the importing state is small;¹³⁷
- National Security (GATT, Article XXI; GATS Article XIV bis.): Members may discriminate on security grounds, including withholding information essential to security interests and taking any actions for protection of security interests;¹³⁸
- General Exceptions (GATT, Article XX): With respect to trade in goods, barring arbitrary or unjustifiable discrimination, member nations may adopt measures:
 - “(a) necessary to protect public morals (or maintain public order);
 - (b) necessary to protect human, animal or plant life or health;
 - (c) relating to the importations or exportations of gold or silver;
 - (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
 - (e) relating to the products of prison labor;

132. GATS, *supra* note 128, art. XVII; GATT, *supra* note 128, art. III.

133. Marrakesh Agreement Establishing the World Trade Organization, art. V ¶ 4, Apr. 15, 1994, 1867 U.N.T.S. 154.

134. ELLIOTT SCH. OF INT’L AFFAIRS, A THREE-YEAR REVIEW OF THE WTO (Steve Suranovic ed., 1998), available at <http://internationalecon.com/wto/wto-toc.php>.

135. *Id.*

136. GATT, *supra* note 128, arts. XII, XVIII:B; GATS, *supra* note 128, art. XII.

137. GATT, *supra* note 128, art. XIV; GATS, *supra* note 128, art. V.

138. GATT, *supra* note 128, art. XXI; GATS, *supra* note 128, art. XIV bis.

- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so submitted and not so disapproved.”¹³⁹
- General Exceptions (GATS, Article XIV): With respect to trade in services, barring arbitrary or unjustifiable discrimination, member nations may adopt measures:
 - “(a) necessary to protect public morals or to maintain public order;
 - (b) necessary to protect human, animal or plant life or health;
 - (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
 - (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
 - (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.”¹⁴⁰

While the economic circumstances and rationales related to anti-offshoring measures discussed earlier are not tied to any of these conditions that would authorize an exception, anti-offshoring measures related to personal data protection introduced in the next section implicate GATS Article XIV(c)(ii) above and will be analyzed therein.¹⁴¹

Next, whether anti-offshoring measures violate a member nation’s commitments to WTO agreements also depends on qualifying terms and/or conditions that may attach to a nation’s entry into these agreements. For instance, GATS currently contains ninety-five schedules of specific commitments in services and sixty-one lists of MFN exemptions.¹⁴² To determine the extent and conditions under which GATS-market access rules, national treatment, and MFN treatment apply within a member nation’s jurisdiction, one must examine that nation’s schedule of covered services and any applicable MFN exemptions.¹⁴³ Additionally, the WTO Agreement on Government Procurement (GPA) must

139. GATT, *supra* note 128, art. XX.

140. GATS, *supra* note 128, art. XIV.

141. GATS, *supra* note 128, art. XIV(c)(ii).

142. *Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Jan. 7, 2014).

143. *Id.*

be considered with respect to anti-offshoring restrictions on government agency procurement of goods and services because, similar to GATS, these agencies must be listed on a member nation's schedule in order to be bound to WTO commitments.¹⁴⁴ The section below will apply this international legal framework of binding obligations, exceptions, and allowance for country-specific terms and conditions to evaluate the legitimacy of anti-offshoring measures in the following member nation and nation-group case studies.

IV. The Questionable Legality of Anti-Offshoring Measures at National and International Levels: A Review of Selected Countries Across the Globe

While the nature and scope of WTO commitments and exceptions indicate that anti-offshoring measures are inconsistent with these commitments, an examination of the interplay between trade laws and anti-offshoring laws at individual country and regional levels is instructive to reveal the complexity and extent to which anti-offshoring laws undermine both the sovereignty of national and international legal systems. First, this section will analyze the United States as a prime example of how nations with a federal system of governance may violate its own constitution and international obligations. Second, this section will review anti-offshoring measures across the globe, with a focus on the EU and other nations that have adopted anti-offshoring measures packaged as personal data protections. Just as with the United States, the EU and other nations may violate their WTO commitments through enactment of these measures. Just as importantly, the suitability of anti-offshoring mechanisms is called into doubt to address the valid public policy concern of data protection, as authorized under GATS Article XIV(c)(ii).¹⁴⁵

A. THE LEGAL VALIDITY OF ANTI-OFFSHORING LAWS IN THE US: POTENTIAL VIOLATIONS TO THE FEDERAL CONSTITUTION AND INTERNATIONAL COMMITMENTS

The U.S. employs a federal system that recognizes the dual sovereignty of both its national and state governments, but state actions may not undermine or conflict with the federal government's right to create and maintain a uniform foreign policy in interstate commerce and dealings with other nations.¹⁴⁶ In correspondence with rising anti-offshoring sentiments in the past decade, described earlier in this paper, state legislators across the nation have been advancing anti-offshoring measures, with varying degrees of frequency and extremes.¹⁴⁷ This ongoing pattern of politicians attempting to pass restrictive

144. Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 33 I.L.M. 1125, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm [hereinafter GPA].

145. GATS, *supra* note 128, art. XIV(c)(ii).

146. See KLINGER & SYKES, *supra* note 24, at 2-7.

147. NAT'L FOUND. FOR AMERICAN POLICY, ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT 2-7 (2007), available at <http://www.nfap.com/pdf/0407OutsourcingBrief.pdf> [hereinafter ANTI-OUTSOURCING EFFORTS].

legislation continues and tends to become heightened in election years; only a fraction of the bills turn into law.¹⁴⁸

Table I provides examples of pending U.S. state bills and laws.

State and Summary of Bill or Legislation	Bill Number
Massachusetts: The state purchasing agent shall give preference, as far as may be practicable and to the extent permitted by the General Laws, federal law, and federal treaty, to products or services manufactured or produced in the United States	H2804 (introduced 2013) ¹⁴⁹
New York: Requires employers to provide notice of outsourcing of jobs prior to such outsourcing; bars governmental agencies from engaging in the practice of outsourcing jobs; requires consumer awareness and consent for disclosure of nonpublic personal information to nonaffiliated third parties; requires legislative ratification of procurement contracts between the state, through the governor, and any multinational trade organization or corporation	S02992 (introduced 2013) ¹⁵⁰
North Carolina: Under the Sustainable Energy-Efficient Buildings Program, a major facility construction or renovation project may utilize a building rating system so long as the rating system (i) provides certification credits for, (ii) provides a preference to be given to, (iii) does not disadvantage, and (iv) promotes building materials or furnishings, including masonry, concrete, steel, textiles, or wood that are manufactured or produced within the state	House Bill 628/ S.L. 2013-242 (enacted 2013) ¹⁵¹
New York: Controls the closure of call centers by public utilities in the state by requiring a hearing before the Public Service Commission when a public utility proposes to close or relocate an existing call center out of state	A7593 / S4208 (enacted 2010) ¹⁵²
Colorado: Restricts state agencies from buying goods or services outside the United States	Senate Bill 228 (enacted 2007) ¹⁵³
Hawaii: Bars state officials from binding state to government procurement rules in international trade agreements without legislative action	House Bill 30 (enacted 2007) ¹⁵⁴
New Hampshire: Establishes a commission to oversee and negotiate issues relative to the North American Free Trade Agreement and the World Trade Organization	Senate Bill 162 (enacted 2007) ¹⁵⁵
North Carolina: Restrictions on call center operations	Senate Bill 514 (enacted 2007) ¹⁵⁶

148. *Id.* at 4–5.

149. H.R. 2804, 2013 Leg., Reg. Sess. (Mass. 2013).

150. S. 02992, 2013 Leg., Reg. Sess. (N.Y. 2013).

151. 2013 N.C. Sess. Laws 242.

152. S. 7593, 2009 Assemb., Reg. Sess. (N.Y. 2010).

153. S. 228, 66th Gen. Assemb., Reg. Sess. (Colo. 2007).

154. H. R. 30, 24th Leg., 1st Spec. Sess. (Haw. 2007).

155. S. 162, 2007 Gen. Ct., Reg. Sess. (N.H. 2007).

156. 2007 N.C. Sess. Laws 514.

California: Requires vendors awarded contracts over \$100,000 to disclose if work will be performed outside the United States	Assembly Bill 1172 (enacted 2006) ¹⁵⁷
Rhode Island: Requires General Assembly to enact legislation to explicitly authorize Governor to commit the state's procurement rules to be bound by a particular trade agreement	House Bill 6885 / Senate Bill 2331 (enacted 2006) ¹⁵⁸
Vermont: Set up commission for conducting annual assessments on impact of international trade agreements	House Bill 109 (enacted 2006) ¹⁵⁹
California: Prohibits sending voter data collected in referendums or initiatives outside the United States	Assembly Bill 1741 (enacted 2005) ¹⁶⁰
Colorado: In-state preference for agricultural products	House Bill 1741 (enacted 2005) ¹⁶¹
Illinois: Expands preferences for products manufactured in the United States	Senate Bill 1723 (enacted 2005) ¹⁶²
Maine: Original version would have banned state contracts with companies that outsource work overseas; Bill was amended to a study	LD 471 / HP 346 (enacted 2005) ¹⁶³
Maryland: Prohibits state officials from binding state to government procurement rules of international trade agreements; Companion is Senate Bill 401	House Bill 514 (enacted 2005) ¹⁶⁴
New Jersey: Prohibits state contract work from being performed outside the United States	Senate Bill 494 (enacted 2005) ¹⁶⁵
North Carolina: Contractors must disclose where work on state contracts will be performed, which affects evaluation of bid	House Bill 800 (enacted 2005) ¹⁶⁶
North Dakota: Gives preference to state bidders when two bids receive same evaluation scores	House Bill 1091 (enacted 2005) ¹⁶⁷

157. Assemb. 1172, 2005–2006 Leg., 1st Reg. Sess. (Cal. 2006).

158. H. R. 6885, 2006 Gen. Assemb., Reg. Sess. (R.I. 2006).

159. H. R. 549, 2006 Gen. Assemb., Reg. Sess. (Vt. 2006).

160. Assemb. 1741, 2005–2006 Leg., 1st Reg. Sess. (Cal. 2005).

161. 2005 Colo. Sess. Laws 1307.

162. S. 1723, 94th Gen. Assemb., 2005 Sess. (Ill. 2005).

163. Legis. Doc. 471, 122d Leg., 1st Reg. Sess. (Me. 2005).

164. H. R. 514, 2005 Gen. Assemb., Reg. Sess. (Md. 2005).

165. S. 494, 211th Leg., 2004 Sess. (N.J. 2005).

166. H. R. 800, 2005 Gen. Assemb., Reg. Sess. (N.C. 2005).

167. H. R. 1091, 59th Legis. Assemb., Reg. Sess. (N.D. 2005).

Alabama: Encourages state and local entities to use state-based professional services but does not restrict or place mandates on procurement decisions	Senate Joint Resolution 63 (enacted 2004) ¹⁶⁸
Colorado: Agencies can contract for personal services performed outside of the United States if (1) it is clearly demonstrated that there will be no reduction in the quality of services offered and (2) contracts contain confidentiality and right to privacy safeguards	House Bill 1373 (enacted 2004) ¹⁶⁹
Indiana: Provides for price preferences between 1 and 5 percent for Indiana companies in awarding state contracts	House Bill 1080 (enacted 2004) ¹⁷⁰
New Jersey: Requires state grants for customized employee training to be returned if jobs for which training was provided are outsourced out of state	Senate Bill 1452 (enacted 2004) ¹⁷¹
North Carolina: Forbids state contracts for telemarketing or call service centers with any company that (1) does not perform work in the United States and (2) fails to solely employ individuals authorized to work in the United States	Senate Bill 991 (enacted 2004) ¹⁷²
Tennessee: Requires the Commissioner of Finance and administration to authorize through regulation a preference for state contract bids that employ U.S. citizens residing in the United States to perform data entry and/or call center services	Senate Bill 2344 (enacted 2004) ¹⁷³
Utah: Funding \$40,000 for a smart site program aimed at supporting local businesses in providing services that might otherwise be performed by state agencies by outsourcing	Senate Bill 109 (enacted 2004) ¹⁷⁴
Pennsylvania: Provides tax credits for call centers physically located in state that employ at least 150 people for the purpose of answering phones	House Bill 200 (enacted 2003) ¹⁷⁵

As the table demonstrates, these anti-offshoring measures vary in application and extremity. One popular action involves government procurement restrictions on overseas goods and services. These include: requiring work be performed on U.S. soil or authorized U.S. workers perform the work in-state¹⁷⁶ or U.S.-based "preferences" that give domestic goods and services preferential treatment;¹⁷⁷ instructing bids by vendors to disclose the site of contract performance; or establishing committees and/or studies on offshoring reduction strategies.¹⁷⁸ Another popular measure targets firms through regulation of call

168. S. J. Res. 63, 2004 Leg., Reg. Sess. (Ala. 2004).

169. H. R. 1373, 63d Gen. Assemb., Reg. Sess. (Colo. 2004).

170. H. Enrolled Act 1080, 113th Gen. Assemb., 2d Reg. Sess. (Ind. 2004).

171. S. 1452, 211th Leg., 2004 Sess. (N.J. 2004).

172. S. 991, 2004 Gen. Assemb. Reg. Sess. (N.C. 2004).

173. S. 2344, 103d Gen. Assemb., Reg. Sess. (Tenn. 2004).

174. S. 199, 2004 Leg., Gen. Sess. (Utah 2004).

175. H. R. 200, 2003 Gen. Assemb., Reg. Sess. (Pa. 2003).

176. KLINGER & SYKES, *supra* note 24, at 4.

177. *Id.* at 11.

178. ANTI-OUTSOURCING EFFORTS, *supra* note 147, at 2-7.

centers abroad, personal data transfer requirements, and ineligibility for government benefits.¹⁷⁹

Regardless of the nature and scope of these actions, anti-offshoring laws arguably interfere with the federal government's ability to maintain a uniform foreign policy and may violate the Federal Constitution on one or more of the following grounds: the supremacy of federal law over state law in exclusive and/or traditional areas of concern (the Doctrine of Preemption), state interference with foreign affairs (the Federal Foreign Affairs Power), and state interference with Congressional authority to regulate commerce with foreign nations (the Federal Commerce Power).¹⁸⁰ The culmination of U.S. Supreme Court jurisprudence prohibits state actions that (1) involve areas of exclusive and/or traditional federal concern, which includes foreign affairs, and/or (2) frustrate the objectives of Congress, federal laws, and treaties.¹⁸¹ In matters implicating parties and activities overseas, the Court has applied one or a combination of the above constitutional principles as the legal underpinnings for their decisions.¹⁸²

While the Court has yet to specifically address the legality of state anti-offshoring actions, case law addressing similar issues points to a finding of constitutional violations.¹⁸³ For instance, in *Hines v. Davidowitz*, the Court invoked the Doctrine of Preemption to invalidate Pennsylvania's Alien Registration Act because the state's measure had an impact on foreign affairs and conflicted with a federal scheme of regulation that provided a standard for the registration of aliens.¹⁸⁴ In discussing the state's impact on foreign affairs, the Court noted that,

it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits.¹⁸⁵

With regards to the state regulation conflicting with federal regulation, the Court reasoned that not only did such a conflict violate the Supremacy Clause, but also added that

179. *Id.*

180. KLINGER & SYKES, *supra* note 24, at 2. For detailed legal analysis on the constitutionality of anti-offshoring measures, see Amar Gupta & Deth Sao, *United States Federalism and Anti-Offshoring Legislation: The Constitutionality of Federal and State Measures Against Global Outsourcing of Professional Services*, 44 TEX. INT'L L.J. 629 (2009).

181. U.S. CONST. art. VI, cl. 2.; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 – 73 (2000).

182. *E.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (maintaining that the validity of state laws implicating federal concerns turns upon whether the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413 (2003) ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.") (quoting *Banco Nacional*, 376 U.S. 398, 427 n.25); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 74 (1st Cir. 1999) ("The Supreme Court has repeatedly cited *Hines* for the proposition that an 'Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'").

183. *See, e.g.*, *Hines*, 312 U.S. at 67; *Nat'l Foreign Trade Council*, 181 F.3d at 74; *Am. Ins. Assoc.*, 539 U.S. at 413.

184. *Hines*, 312 U.S. at 66–67.

185. *Id.* at 68.

state actions will likely be invalid in the absence of conflict between federal and state laws if they impede congressional objectives.¹⁸⁶ Whether or not a state action poses a sufficient barrier “is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”¹⁸⁷

Here, state anti-offshoring measures clearly touch upon foreign affairs, an area of federal concern. Furthermore, these measures likely prevent Congress from achieving its trade liberalization and global market access objectives, as evidenced by U.S. membership in and congressional ratification of WTO agreements. As the *Hines* Court’s reasoning above indicates, this conclusion still likely holds in the absence of existing federal laws that directly address the anti-offshoring action in question.¹⁸⁸ It is realistic to envision both scenarios here, due to the plethora and differences in types of anti-shoring measures and federal enactment of various trade agreements.

Additionally, while congressional objectives and statutes may trump state anti-offshoring legislation, it is also important to note that states may have possible defenses against this constitutional challenge. The inherent ambiguity and exceptions expressed in federal statutes and trade agreements (as discussed earlier) may allow certain state actions to withstand constitutional challenges, as they indicate congressional acquiescence or endorsement of state laws regulating certain aspects of professional services.¹⁸⁹

In addition to the potential for state anti-offshoring actions to violate Federal Constitutional provisions, anti-offshoring actions by Congress also likely place the federal government in violation of international obligations. Similar to their state counterparts, federal legislators have and continue to propose numerous anti-offshoring bills that would undercut the nation’s commitments to trade agreements if enacted.¹⁹⁰ The following bills represent a brief summary of offshoring initiatives currently before Congress (2013):

- *Stop Outsourcing and Create American Jobs Act* (H.R. 2740), which imposes increased penalties for tax evasion practices in haven countries that ship U.S. jobs overseas and for other purposes;¹⁹¹
- *Bring Jobs Home Act* (H.R. 851), which amends the Internal Revenue Code, encourages domestic insourcing and discourages foreign outsourcing;¹⁹²
- *American Jobs Matter Act* (S. 1246), which requires contracting officers to consider information regarding domestic employment before awarding a federal defense contract and for other purposes;¹⁹³

186. *See id.* at 66.

187. *Crosby*, 530 U.S. at 373 (citing *Hines*, 312 U.S. at 67).

188. *See Hines*, 312 U.S. at 68.

189. *See generally* 19 U.S.C. §§ 3301–3473 (providing states with the ability to enact provisions, including restrictions, that fall within the allowed exceptions and reservations).

190. *See e.g.*, United States Call Center Worker and Consumer Protection Act, H.R. 2909, 113th Cong. (2013); Bring Jobs Home Act, H.R. 851, 113th Cong. (2013); Outsourcing Accountability Act, H.R. 790, 113th Cong. (2013); United States Call Center Worker and Consumer Protection Act, H.R. 2909, 113th Cong. (2013).

191. Stop Outsourcing and Create American Jobs Act, H.R. 2740, 113th Cong. (2013).

192. H.R. 851.

193. American Jobs Matter Act, S. 1246, 113th Cong. (2013).

- *Outsourcing Accountability Act* (H.R. 790), which requires the disclosure of the total number of a company's domestic and foreign employees;¹⁹⁴ and
- *United States Call Center Worker and Consumer Protection Act* (H.R. 2909), which requires the Secretary of Labor to maintain a publicly available list of all employers that relocate a call center overseas, to make such companies ineligible for federal grants or guaranteed loans, and to require disclosure of the physical location of business agents engaging in customer service communications and for other purposes.¹⁹⁵

Notwithstanding the high popularity and political capital of these bills, Congress has thus far only enacted one such measure. The Thomas-Voinovich Amendment (TVA) was ratified in 2004 and operated as a temporary amendment on 2004 appropriations that barred all executive agency work from being performed by contractors abroad.¹⁹⁶ The application of the TVA required domestic and foreign businesses seeking federal government contracts to use domestic workers to perform the contract work.¹⁹⁷

Just as with state anti-offshoring measures, federal actions in this area likely violate the nation's commitments to international trade agreements. Federal contract restrictions, such as the TVA's U.S. worker requirement for 2004 appropriations, break the federal government's pledge to extend equal treatment to domestic and foreign entities under the GPA.¹⁹⁸ Even though the TVA applied to both domestic and foreign companies, foreign companies faced potentially greater transactions costs (e.g., relocation expenses) and domestic companies already offshoring would have to shift production processes to qualify for these bids.¹⁹⁹

Finally, it is important to acknowledge that exceptions and defenses may also be successfully raised. For instance, federal contract restrictions on site and worker requirements may potentially withstand GPA violations because the U.S. inclusion of Annex I to the GPA does not bind all federal agencies to the agreement.²⁰⁰ Other loopholes include provisions in federal statutes ratifying the trade agreement in question, which empowers U.S. laws with pre-emptory effect in the event of conflict.²⁰¹ Furthermore, where there is a conflict between a federal statute and federal treaty, the U.S. Supreme Court holds that the "one last in date will control."²⁰²

194. H.R. 790.

195. H.R. 2909.

196. Consolidations Appropriations Act of 2004, Pub. L. No. 108-199, § 647(e), 118 Stat. 3.

197. KLINGER & SYKES, *supra* note 24, at 19–20.

198. SHANNON KLINGER & M. LYNN SYKES, *EXPORTING THE LAW: A LEGAL ANALYSIS OF STATE AND FEDERAL OUTSOURCING LEGISLATION* 19 (2004), available at http://www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf.

199. *Id.*

200. See GPA, *supra* note 144, Annex 1(1)–(5), available at http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#taipei (omitting agencies not bound).

201. *E.g.*, 19 U.S.C.A. § 3512(a)(1) (West 2013).

202. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

B. THE LEGAL VALIDITY OF ANTI-OFFSHORING LAWS ACROSS THE GLOBE: THE APPROPRIATENESS OF ANTI-OFFSHORING MEASURES TO RESOLVE PUBLIC POLICY CONCERNS ON PERSONAL DATA PROTECTION

In addition to the United States, countries around the world have proposed and/or implemented various anti-offshoring initiatives. One of the most globally popular and controversial measures involves laws aimed at protecting the privacy of personal data. This type of legislation in particular warrants greater examination, as it not only echoes the United States' quandary of legal repercussions on a global level but also introduces public policy concerns and whether anti-offshoring measures are a suitable solution. Indeed, offshoring within certain industries necessitates the transfer of a consumer's medical, personal, or financial information, prompting concerns that such data may be misused or stolen.²⁰³ The GATS General Exception Article XIV(c)(ii) (discussed earlier) allows for personal data transfer restrictions, provided they are "not arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."²⁰⁴ A case study of the EU's construction and application of these personal data protection measures, however, brings into question whether valid public policy or protectionist goals are achieved.

First, it is useful to recognize the understandable global concern and motivation behind measures aimed at personal data protection. Major incidents involving compromise of large amounts of personal data are listed in Table II below:

Nation	Company	Data Breach Description	Year	Number Affected
U.S.	Epsilon	The world's largest provider of permission-based email marketing suffered a huge data breach; Hackers may have swiped customer data belonging to the world's biggest brands	2011	40 billion ²⁰⁵
China	Shanghai Roadway D&B Marketing Services	Company allegedly illegally bought and sold customer information	2012	150 million ²⁰⁶
U.S.	Heartland Payment Systems, Tower Federal Credit Union, Beverly National Bank	Malicious software/hack compromises unknown number of credit cards at fifth largest credit card processor	2009	130 million ²⁰⁷

203. See ANTI-OUTSOURCING EFFORTS, *supra* note 147, at 7–8.

204. GATS, *supra* note 128, art. XIV.

205. Taylor Armerding, *The 15 Worst Data Security Breaches of the 21st Century*, CSO ONLINE (Feb. 15, 2012), <http://www.csoonline.com/article/700263/the-15-worst-data-security-breaches-of-the-21st-century>.

206. *Largest Data Loss Incidents*, DATALOSSDB.ORG, <http://datalossdb.org/index/largest> (last visited Jan. 8, 2014).

207. *Id.*

U.S.	TJX Companies	Credit card numbers and transaction details compromised	2007	94 million ²⁰⁸
U.S.	TRW, Sears Roebuck	Hackers accessed credit-reporting database	1984	90 million ²⁰⁹
U.S.	Sony Corporation	Names, addresses, email addresses, birthdates, passwords and logins, handle/PSN online ID, profile data, purchase history, and possibly credit card info compromised	2011	77 million ²¹⁰
U.S.	CardSystems, Visa, MasterCard, American Express	Major card processor breached	2004	40 million ²¹¹
China	Tianya	Forum members' usernames and clear-text passwords leaked online by hackers	2011	40 million ²¹²
Korea	SK Communications, Nate, Cyworld	Names, email addresses, phone numbers, encrypted resident registration numbers, and passwords accessed by hacker	2011	35 million ²¹³
U.S.	Steam (Valve, Inc.)	User names, passwords, game purchases, email addresses, billing addresses, and encrypted credit card information	2011	35 million ²¹⁴
U.S.	RockYou Inc.	User names and passwords	2009	32 million ²¹⁵
U.S.	U.S. Department of Veterans Affairs	Names, Social Security numbers, and dates of birth of veterans	2006	26.5 million ²¹⁶

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

Great Britain	HM Revenue, Customs, TNT	Two missing CDs with addresses, dates of birth, and National Insurance numbers of the entire HMRC child benefit database as well as 7 million banking details compromised	2007	25 million ²¹⁷
U.S.	Zappos	Email addresses, billing and shipping addresses, phone numbers, the last four digits from credit cards, and passwords compromised	2012	24 million ²¹⁸
China	7k7k	Data for game site users compromised	2011	20 million ²¹⁹
U.S.	Care2	Forced password reset	2011	18 million ²²⁰
Germany	T-Mobile, Deutsche Telekom	Customer data compromised	2008	17 million ²²¹
Korea	Nexon Korea Corp	Names, usernames, encrypted resident registration numbers, and passwords compromised	2011	13 million ²²²
U.S.	Bank of New York Mellon Corp.	Back-up tape of BNY Mellon Shareholder services containing names, Social Security numbers, and possibly banking information compromised	2008	12.5 million ²²³

217. Patrick Wintour, *Lost in the Post—25 Million at Risk After Data Discs Go Missing*, THE GUARDIAN, Nov. 20, 2007, at 1 available at <http://www.theguardian.com/politics/2007/nov/21/immigrationpolicy.economy3>.

218. David Goldman, *Zappos Hacked, 24 Million Accounts Accessed*, CNN MONEY (Jan. 16, 2012, 11:33 AM), http://money.cnn.com/2012/01/16/technology/zappos_hack/.

219. C. Custer, *Hackers Steal Data of Millions of Chinese Net Users*, TECH IN ASIA (Dec. 22, 2011, 2:43 PM), <http://www.techinasia.com/hackers-steal-data-of-millions-of-chinese-net-users/>.

220. *Care2 Acknowledges Security Breach*, ESECURITY PLANET (Jan. 2, 2012), <http://www.esecurityplanet.com/network-security/care2-acknowledges-security-breach.html>.

221. *Telekom Says Data From 17 Million Customers was Stolen*, DEUTSCHE WELLE (Apr. 10, 2008), <http://www.dw.de/telekom-says-data-from-17-million-customers-was-stolen/a-3690132-1>.

222. Sung-won Shim, *Data of 13 Million South Korean Online Game Subscribers Hacked*, REUTERS (Nov. 26, 2011, 6:28 AM), <http://www.reuters.com/article/2011/11/26/us-korea-hacking-nexon-idUSTRE7AP09H20111126>.

223. Jonathan Stempel, *Bank of NY Mellon Data Breach Now Affects 12.5 Mln*, REUTERS (Aug. 28, 2008, 4:00 PM), <http://www.reuters.com/article/2008/08/28/bankofnymellon-breach-idUSWNB863220080828>.

Canada	Canada Revenue Agency	Vital records of 1985 Canadian taxpayers was stolen from Toronto's District Taxation Center	1986	16 million ²²⁴
--------	-----------------------	---	------	---------------------------

Countries that have enacted laws related to personal data transfers include Argentina, Austria, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guernsey, Hong Kong, Hungary, Iceland, India, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Philippines, Romania, Poland, Portugal, Singapore, Slovak Republic, Slovenia, South Africa, South Korea, Spain, Switzerland, Sweden, Taiwan, Thailand, United Kingdom, and Vietnam.²²⁵ And just as with the individual states within the United States, several sub-national governments have also passed similar legislation. For instance, the Chinese province of Jiangsu, where many foreign manufacturing joint ventures are located, enacted the 2012 Regulation of Information Technology of Jiangsu Province, an ordinance requiring consent or official approval for data transfers outside the state.²²⁶

Additionally, a number of countries are currently considering personal data transfer proposals. For example, the Australian Parliament is involved in an ongoing review of the following bill: "Keeping Jobs from Going Offshore (Protection of Personal Information) Bill," which continues to be re-introduced in subsequent sessions.²²⁷ The very name of the bill points to the intent of restricting offshoring on the basis of protecting personal information.²²⁸ "The proposed legislation specifically targets the offshoring of customer service operations to locations such as India and the Philippines. If approved, it will create a number of obstacles for organizations that are having some or all of their business processes handled overseas."²²⁹

While the magnitude and occurrence of personal data breaches has and can take place anywhere in the world, and warrants justifiable public policy concerns, a closer examination of several of these anti-offshoring measures reveals that their effect does more to

224. JOHN R. VACCA, *COMPUTER AND INFORMATION SECURITY HANDBOOK* 741 (Newnes, 2nd ed. 2012).

225. *International Privacy Laws*, INFORMATION SHIELD, <http://www.informationshield.com/intprivacylaws.html> (last visited Jan. 8, 2014); see generally DLA PIPER, *DATA PROTECTION LAWS OF THE WORLD* (Cameron Craig et al. eds., 2012), available at http://information.dla.com/information/published/DPLaw_World_Handbook_2012.pdf.

226. SpeechlyBircham, *Information Law Up-date*, SPEECHLYS.COM, 22 (Feb. 21, 2013), http://www.speechlys.com/media/158882/2013-02-12_-_information_law_up-date_webinar_21_feb_2013_eyl_14293733_1.pdf; Michael Standaert, *Jiangsu Province Rules May Be 'Milestone' For Privacy Trend in China*, ATTORNEY SAYS, BNA PRIVACY LAW WATCH, Nov. 16, 2011, available at <http://www.hunton.com/files/News/1c00a732-d81e-4e66-a361-4a5052c66573/Presentation/NewsAttachment/1a5e9a77-a82b-40b9-bfa6-4a8a5171d9e7/News%20Clip%20-%20BNA%20Privacy%20Law%20Watch%20-%20Jiangsu%20Province%20Rules%20May%20Be%20'Milestone'%20For%20Privacy%20Trend%20.pdf>.

227. *Keeping Jobs from Going Offshore (Protection of Personal Information) Bill 2009 [2010]*, PARLIAMENT OF AUSTRALIA, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s734 (last visited Dec. 30, 2013).

228. See *Keeping Jobs from Going Offshore (Protection of Personal Information) Bill 200 (Cth)* (Austl.), available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s734_first/toc_pdf/0921320.pdf;fileType=application%2Fpdf.

229. *Australian BPO Industry Responds to Anti-Offshoring Legislation*, THE SAUCE (Jul. 20, 2010), <http://thesauce.net.au/australian-bpo-industry-responds-to-anti-offshoring-legislation/>.

discriminate between domestic and foreign providers than anything else. Frequently, the standards imposed for the transfer, processing, and use of data beyond the particular country or region (such as the EU) are more stringent than the standards for such transfer, processing, and use of data and information within that country or region.²³⁰ For example, the 1995 Data Protection Directive of the European Union (Directive) specifies that the transfer of personal information of EU citizens to a third country can take place if the third country meets the data adequacy norms of the EU.²³¹ This means that, unlike EU-based providers, foreign-based providers who engage in data transfers to non-EU countries are subject to formal, complicated, and bureaucratic processes that involve, among other things, establishment and documentation of transfer procedures and development and implementation of appropriate compliance tools.²³²

In case the third country does not meet the norms of EU, the Directive offers a set of derogations enabling data transfer that include the mechanisms of Binding Corporate Rules (BCR) and Standard Contractual Clauses (SCCs).²³³ This increases the compliance costs for companies in these countries and places these companies at a disadvantage as compared to companies located within the EU. Furthermore, while the Directive establishes common EU principles for information privacy, Member States interpret these principles differently and consequently enacted a patchwork of legislation with varying requirements.²³⁴ For instance, Germany's consent laws are stricter than the Directive guidelines.²³⁵

While revisions were proposed to the Directive in early 2012, these revisions do not directly address this issue.²³⁶ Rather than confronting discriminatory issues such as stricter standards and administrative burdens imposed on foreign firms, the Consultative Committee proposed a "General Data Protection Regulation" (EU Data Regulation) that included, among other recommendations, maintenance of adequate levels of protection and implementation of standard contractual clauses and binding corporate rules.²³⁷ In

230. See e.g., Philip Urofsky & Grace Harbour, *Internal Investigations & Oversight Corporate Communications*, 2 BLOOMBERG LAW REPORTS 19, 20–24 (2009), available at <http://www.shearman.com/files/Publication/7cc68adc-67dc-4fc4-a497-d2634d939789/Presentation/PublicationAttachment/16d7d0ca-10d9-4001-82a1-93964c50f15b/LT-092209-US-Internal-Investigations-and-Foreign-Data-Protection-Laws.pdf>; Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 895 (2013).

231. Council Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, art. 25(1), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF>.

232. Lucas Bergkamp, *EU Data Protection Policy- The Privacy Fallacy: Adverse Effects Of Europe's Data Protection Policy In An Information-Driven Economy*, 18 COMPUTER L. & SECURITY REP. 31, 38 (2002).

233. Council Directive 95/46/EC, *supra* note 231, art. 26(2), 26(4). Commission Decisions 2001/497/EC and 2004/915/EC apply to transfers from data controllers to data controllers. See Commission Decision 2001/497, 2001 O.J. (L181) 19 (EC); Commission Decision 2004/915, 2004 O.J. (L385) 74 (EC); Commission Decision 2010/87/EU (formerly, 2002/16/EC) applies to transfers from data controllers to data processors. See Commission Decision 2010/87, 2010 O.J. (L 39) 5 (EU).

234. See Council Directive 95/46/EC, *supra* note 231, art. 32; Urofsky & Harbour, *supra* note 230, at 21.

235. Urofsky & Harbour, *supra* note 230, at 21.

236. The Consultative Comm. of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Council of Eur., *Proposals of Modernisation*, T-PD_2014_04_rev4_E, 2 (Dec. 18, 2012), available at [http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD\(2012\)04Rev4_E_Proposals%20of%20modernisation\(FINAL\).pdf](http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD(2012)04Rev4_E_Proposals%20of%20modernisation(FINAL).pdf).

237. *Id.* at 6–7.

fact, it has been argued that some of these proposed measures will increase transaction costs.²³⁸ One such proposal vests the data protection authority in each Member State, with the authority to impose fines of up to 2 percent of the worldwide gross revenue of the company that is found to be deficient in complying with the data privacy provisions.²³⁹ The situation is further complicated by the fact that some data protection authorities are subject to freedom of information legislation of their respective countries and information submitted by companies as part of their applications for BCR authorization can be potentially made available to others.²⁴⁰ This again places the foreign companies at a competitive disadvantage in comparison to domestic companies.

In its finalized version (ratification of which has been postponed until later this year), the EU Data Regulation seeks to lower compliance costs by mandating uniform rules for all Member States and increasing the number of ways businesses may demonstrate compliance with EU standards.²⁴¹ Other current corrective measures have limited or questionable effect. For instance, it is instructive to consider EU actions taken with respect to its determination that the United States does not meet the data adequacy standards of the EU.²⁴² A separate agreement, known as the "Safe Harbor," was negotiated and signed between the EU and the United States to allow transfer of data without imposing major overheads on U.S. companies.²⁴³ Enforcement of this agreement, however, has been criticized for being more stringent than enforcement under the Directive.²⁴⁴

Furthermore, the increase in and creation of new market entry barriers towards U.S. firms in particular indicates that the Directive is motivated by protectionist motives.²⁴⁵ This is so because, unlike EU firms, U.S. counterparts are more advanced users of information and need access to consumer data required for targeted marketing.²⁴⁶ As such, U.S. firms engaging in services such as direct marketing and consumer credit are at a distinct disadvantage with respect to their EU competitors.²⁴⁷ While a few of these pro-

238. E.g., Ulrich Bäumer & Stephanie Ostermann, *New EU Data Protection Regulation to Affect Data Protection Act*, INTERNATIONAL LAW OFFICE (Aug. 24, 2012), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=476507af-d583-4f10-9857-f5d82c64439a>.

239. Press Release, Eur. Comm'n, Comm'n Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of their Data and to Cut Costs for Bus. (Jan. 25, 2012), available at http://europa.eu/rapid/press-release_IP-12-46_en.htm.

240. See Donald C. Dowling Jr., *International Data Protection and Privacy Law*, WHITE & CASE 19 n.136 (Aug. 2009), http://www.whitecase.com/files/Publication/367982f8-6dc9-478e-ab2f-5fd2d96f84a/Presentation/PublicationAttachment/30c48c85-a6c4-4c37-84bd-6a4851f87a77/article_IntlDataProtectionandPrivacyLaw_v5.pdf.

241. Press Release, Eur. Comm'n, The Data Protection Reform- One Year On (Jan. 28, 2013) (available at http://europa.eu/rapid/press-release_MEMO-13-39_en.htm); Jorg Walter, *Vote on EU Data Protection Regulation Again Postponed*, INSIDE PRIVACY (June 21, 2013), <http://www.insideprivacy.com/international/vote-on-eu-data-protection-regulation-again-postponed/>; Monika Kuschewsky, *EU Parliament's Lead Committee Will Vote on EU Data Protection Regulation in October*, INSIDE PRIVACY (Sept. 17, 2003), <http://www.insideprivacy.com/eu-parliaments-lead-committee-will-vote-on-eu-data-protection-regulation-in-october/>.

242. See Paul M. Schwartz, *Privacy And Technology: The EU-U.S. Privacy Collision: A Turn To Institutions And Procedures*, 126 HARV. L. REV. 1966, 1979 (2013).

243. *U.S.-EU Safe Harbor Overview*, EXPORT.GOV, http://export.gov/safeharbor/eu/eg_main_018476.asp (last visited Jan. 8, 2014).

244. Bergkamp, *supra* note 232, at 39.

245. *Id.*

246. *Id.*

247. *Id.*

posed measures, such as implementation of a uniform policy, will help to lessen administrative costs of compliance to some degree, greater reform measures are still needed to eliminate the discriminatory effect of current standards and procedures.²⁴⁸

The findings that the Directive discriminates against foreign suppliers and creates an obstacle to trade are clearly in violation of GATS principles of market access, MFN treatment and national treatment, the relevant WTO agreement in this matter, and the agreement in which the EU claims membership (in addition to individual membership held by several EU Member States).²⁴⁹ To determine whether such discrimination is valid under the relevant GATS exception, Article XIV(c)(ii), which permits actions that ensure "the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts," so long as they are not "arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."²⁵⁰ Before beginning the determination, it is important to stress once again that GATS utilizes a positive-list approach to services coverage, so that it is necessary to first ascertain whether the service in question is subject to GATS commitments and is excluded from the MFN exemption list.²⁵¹ Here, the Directive implicates any number of services that involve the flow of personal data, including but not limited to data processing, "human resources information management, e-commerce operations, advertising services, market research and public opinion polling services, etc. . . ." ²⁵² In the interest of streamlining the analysis and demonstrating that anti-offshoring measures of this nature are, in fact, a "disguised restriction" on trade in services and violate the spirit of WTO agreements notwithstanding GATS exceptions, this hypothetical exercise will assume EU blanket inclusion of services under the Directive.

As there has yet to be a WTO Panel Decision specifically addressing GATS Article XIV(c)(ii), scholars propose adopting the Panel Decision's methodology on GATT Article XX exceptions in reaching an outcome on this issue.²⁵³ First, a determination of a GATS principle violation must be found.²⁵⁴ Here, trade in tasks of data services processing is one example of a potential violation of GATS MFN treatment.²⁵⁵ As discussed earlier, the EU treats some countries (such as the United States) less favorably than others, depending on the EU's determination that a country provides inadequate data protection and thus subjects them to new and higher barriers to market entry.²⁵⁶ Furthermore, studies indicate that in practice, EU Member States do not pursue measures to meet the adequate levels of

248. See Eur. Comm'n, *supra* note 241; Bergkamp, *supra* note 232, at 39 – 40.

249. See GATT, *supra* note 128, art. I, art. III; GATS, *supra* note 128, arts. II, XVII.; see also *WTO I-Tip Services*, WORLD TRADE ORG., <http://i-tip.wto.org/services/> (last visited Oct. 1, 2013).

250. GATS, *supra* note 128, art. XIV.

251. See *supra* text accompanying note 140.

252. MARÍA VERÓNICA PEREZ ASINARI, *THE WTO AND THE PROTECTION OF PERSONAL DATA. DO EU MEASURES FALL WITHIN GATS EXCEPTION? WHICH FUTURE FOR DATA PROTECTION WITHIN THE WTO E-COMMERCE CONTEXT?* 4 (2003), available at <http://www.bileta.ac.uk/content/files/conference%20papers/2003/The%20WTO%20and%20the%20Protection%20of%20Personal%20Data.%20Do%20EU%20Measures%20Fall%20within%20GATS%20Exception.pdf>.

253. *Id.* at 3.

254. *Id.* at 4.

255. *Id.*

256. See *id.*

data protection that it demands from third countries. For instance, a 2001 international comparison study on internet privacy indicated that U.S. sites surpassed EU sites by providing users with a choice to be on mailing lists, despite the EU requirement that all sites do so.²⁵⁷

Second, it must be determined whether the measure in question complies with the spirit of GATS such that it is consistent with the agreement's aims as a whole.²⁵⁸ The GATS preamble offers insight, noting that it respects a member nation's right to pursue national policy objectives.²⁵⁹ The Directive falls into this mission, as it represents the EU's supranational policy of regulating in this area and advances the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, and many EU Member-State constitutions.²⁶⁰ On the other hand, it must also be noted that the GATS preamble begins with the following two objectives:

Recognizing the growing importance of trade in services for the growth and development of the world economy; *Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries.²⁶¹

Furthermore, the GATS preamble goes on to seek "an overall balance of rights and obligations," indicating that valid national policy objectives do not automatically trump trade liberalization goals.²⁶²

Next, it must be determined whether the measure in question is necessary for compliance with a member nation's laws.²⁶³ Panels generally interpret this to mean no alternative measures that are less restrictive are available that would reasonably achieve the same policy objective and are consistent with WTO provisions.²⁶⁴ Here, the Directive's measures are likely not necessary to secure compliance with the EU data protection regime because (1) the Directive only requires "adequate" foreign privacy protection as opposed to "equivalent" or "identical" protection (as mandated by Safe Harbor agreements); and (2) there is no empirical evidence to show that the Directive's measures are better than other less restrictive mechanisms employed elsewhere, such as U.S. privacy self-regulation.²⁶⁵

Finally, it must be determined that the measure is "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."²⁶⁶

257. Bergkamp, *supra* note 232, at 38.

258. ASINARI, *supra* note 252, at 5.

259. *Id.* (quoting GATS, *supra* note 128, pmbl).

260. *Id.*

261. GATS, *supra* note 128, pmbl.

262. *Id.*

263. ASINARI, *supra* note 252, at 5.

264. *Id.*

265. Bergkamp, *supra* note 232, at 39 – 40.

266. ASINARI, *supra* note 252, at 6 (quoting GATS, *supra* note 128, art. XIV).

Here, a discriminatory measure is "arbitrary or unjustified" if the EU allowed personal data transfer in one country and barred it in another, when both countries in equivalent circumstances share or lack similar regulations.²⁶⁷ A "disguised restriction" is premised on protectionism, where the intent behind the Directive's third country adequacy determinations is to give EU providers a competitive edge.²⁶⁸ The "adequacy method" employed by the EU is, by its nature, a subjective approach that examines third countries on case-by-case basis (due to differences in legal and regulatory systems).²⁶⁹ Using this method, the EU assesses whether a third country has the principles of content and procedure required for adequacy.²⁷⁰ In taking the case of the United States for example, the above analysis of discriminatory treatment by the EU indicates that the Directive may work as a "disguised restriction," given U.S. supremacy in data-intensive markets and the lack of empirical evidence that U.S. mechanisms are inferior. Given the likelihood of findings against the Directive in almost all these four assessments, the use of anti-offshoring measures such as those espoused by the EU fails to achieve legitimate public policy goals of greater data protection and succeeds only in increasing trade barriers and transaction costs.

V. Conclusion

The international trade regime has made great inroads in trade liberalization of goods and services for well over half a century, enabling economies across the globe to grow and prosper with corresponding positive, diffusive effects on society.²⁷¹ As the above analysis demonstrates, anti-offshoring measures threaten the stability and strength of a supranational economic and legal framework built upon through many rounds of negotiations by nations and the proliferation of cross-border business relationships. Because these measures serve to violate legally binding commitments that many nations have made to international and multilateral trade agreements and to incur negative economic impact at home and abroad, it is vital to pursue alternative strategies to adjust for any adverse distributional effects that offshoring incurs.

While offshoring delivers long-term benefits in the aggregate, empirical evidence (as discussed in this paper) confirms that at individual industry levels, this process of resource reallocation results in worker job displacement and/or difficulty in finding employment with comparable pay.²⁷² Cross-country comparisons and country-specific studies have demonstrated that pro-business policies such as labor market flexibility and investment, coupled with labor support initiatives involving worker retraining and mobility, are an optimal solution.²⁷³ Based on this body of research, the resulting economic insecurity arising from job displacement is mitigated when the presence of the following factors come into play: regulations promoting firm flexibility in hiring and firing (less restrictive

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. See WORLD TRADE ORG., 10 BENEFITS OF THE WTO TRADING SYSTEM 1 (2008), available at http://www.wto.org/english/res_e/doload_e/10b_e.pdf.

272. See CHANG, *supra* note 35, at 16 – 17.

273. E.g., Milberg & Winkler, *supra* note 5, at 165, 187 – 88.

employment protection legislation), training and retraining programs, and unemployment benefits.²⁷⁴

Affirming such findings are country-specific examples, such as Denmark, that demonstrate that labor market flexibility and labor support programs are effective strategies to offset offshoring's negative distributional effects.²⁷⁵ In Denmark, employment protection is weak, as Danish firms have great flexibility in hiring and firing.²⁷⁶ To correct the adverse effect of high job turnover rates, the country utilizes a "flexicurity" model that offers incentives (e.g., relatively generous unemployment benefits) and penalties to motivate workers towards quick re-employment (e.g., monitoring and sanctions to spur job search efforts).²⁷⁷ Observers note that it is Denmark's focus on worker training and mobility, rather than restrictive employment measures, that has enabled the country to thrive in ever changing economic circumstances tied to the growth of international trade.²⁷⁸ These policies made Denmark a desirable location for foreign firms and gave Danish firms a competitive edge.²⁷⁹ Danish workers also benefited, as these labor support programs helped them quickly adjust and recover from job displacement and related costs arising from international trade activities, such as offshoring.²⁸⁰ While critics may point out that such redistributionist policies would fail in larger and/or more diverse countries such as the United States, due to the lack of collective goals and values, Denmark offers a real-life example of how non-discriminatory trade measures (such as social welfare programs and business-growth policies) may feasibly help nations adjust to and benefit from globalization processes.²⁸¹ If nations seek lasting economic growth individually and collectively, they must agree to trade-liberalizing, non-discriminatory measures in order to benefit from inevitable changes in their industries and technology.

274. *Id.* at 165. For example, a 2010 Milberg and Winkler cross-country study of fifteen OECD countries, spanning 1991 to 2008 and covering twenty-one manufacturing sectors, revealed that offshoring had a larger positive effect on countries that spent more on labor market policies and higher short-term unemployment replacement benefits. *Id.* at 188.

275. *See id.* at 187.

276. Hummels et al., *supra* note 63, at 6.

277. *Id.*

278. Thomas Bredgaard & Arthur Daemrich, *The Welfare State as an Investment Strategy: Denmark's Flexicurity Policies*, in THE OXFORD HANDBOOK OF OFFSHORING AND GLOBAL EMPLOYMENT 159, 174 (Ashok Bardhan, et al. eds., 2013).

279. *Id.*

280. *Id.*

281. *See id.* at 16.

